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FEDERAL COMMUNICATIONS COMMISSION
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October 6, 1998

VIA HAND DELIVERY
Ms. Magalie Roman-Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: GST Telecom Inc.'s Comments in Opposition to US WEST Communications, Inc.'s Petition for Forbearance in CC Docket No. 98-157

Enclosed please find an original and five copies of GST Telecom Inc.'s comments in the above-captioned matter.

Please date stamp and return the additional fifth copy of the filing to the messenger. Copies will be delivered under separate cover to the Commission's copy contractor and the Competitive Pricing Division. Should you have any questions concerning this filing, please direct them to the undersigned at 360-356-7104.

Sincerely,

Barry Pineles

Barry Pineles
Regulatory Counsel for GST Telecom Inc.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Petition of US WEST Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA	)	CC Docket No. 98-157

Comments of GST Telecom Inc.
in Opposition to the Petition for Forbearance

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October 7, 1998

Executive Summary

US WEST filed a petition a forbearance pursuant to section 10 of the Communications Act of 1934, as amended. US WEST requests that FCC forbear from the following regulations: 1) interstate access tariff filing requirements; 2) filing tariffs upon 15-day notice with substantial cost supporting material; 3) geographically averaging its rates; 4) price cap regulation; and 5) any other rule applicable to US WEST but not to its competitors. In short, US WEST requests that it be considered a nondominant carrier. Recognizing that the FCC would not forbear from regulating US WEST, the ILEC in 14 Midwestern and Western states, US WEST limited its forbearance petition to high capacity services in the Phoenix, Arizona MSA.

The FCC must forbear from regulating if three standards are met:1) enforcement is not necessary to ensure that rates and practices are just, reasonable, and nondiscriminatory; 2) enforcement is not necessary to protect consumers; and 3) forbearance will be in the public interest. GST, a facilities-based carrier competing against US WEST in the Phoenix MSA, asserts that US WEST has not met any of these standards and furthermore will not promote competition for high-capacity services. Therefore, the FCC must deny the petition.

GST first must dispel the notion, planted by US WEST, that GST has resources or access to resources that equal or surpass US WEST's. In Arizona alone, US WEST has ten times the amount of fiber that GST has and that does not count the approximately 42,000 miles of copper in the state. US WEST has about 2.3 million access lines in Arizona in comparison to the 100,000 access lines installed by GST throughout its ten states of operation. The difference in size translates into dramatically different financial resources. US WEST's net income exceeded GST's gross annual revenue by a factor of 6 and its total assets exceed GST's by a factor of nearly 40. Finally, GST is considered by the federal government to be a small business whereas US WEST with its 67,000 employees is anything but a small business. It is simply ludicrous for US WEST to assert that GST has the same resources to compete with US WEST in Phoenix or any other part of US WEST's territory.

GST and US WEST concur in the interpretation of the FCC's precedent concerning the analysis of market power. Where GST and US WEST part company is in the conclusion that can be garnered from that analysis.

US WEST asserts that it faces substantial competition for high capacity services in the Phoenix MSA. GST disagrees for several reasons. First, US WEST contends that there are adequate substitutes for its high capacity services but conveniently forgets to mention that all competitors must interconnect with US WEST's network in an effort to provide service. Such bottleneck control has simply not diminished to the point that US WEST could not leverage its control to unfairly compete against GST and other facilities-based carriers. Second, US WEST's assertion that it has lost market share and that it controls only 30 percent of the retail market are simply irrelevant to the consideration of US WEST's market power. Third, US WEST never adequately defines the market for high capacity services and in some cases uses statistics that include DS-0s, i.e., standard voice grade circuits which are anything but high capacity services. Ultimately, US WEST cannot escape the simple fact, and does not try to deny it, that it controls 77 percent of the market for high capacity services in the Phoenix MSA a figure sufficient to raise substantial competitive concerns absent some form of regulatory oversight.

US WEST's dominance in the Phoenix MSA is compounded by its dominance in other Midwestern and Western states. US WEST files one tariff federal price cap regulated access tariff. US WEST, could raise the price in its other territories but yet stay within the price cap indices so that the rates would escape FCC scrutiny, and subsidize predatory pricing in the Phoenix MSA. No other competitor has the ability to utilize captive customers to subsidize competitive efforts. The FCC should not play into US WEST's hand by forbearing from regulation thereby increasing US WEST's ability to dominate the Phoenix MSA market.

US WEST attempts to portray itself as simply another provider of access service in the Phoenix MSA and therefore should be eligible for permissive detariffing. However, the FCC's decision to allow exchange access providers to detariff does not apply to ILECs and US WEST is the ILEC for the Phoenix MSA.

If the petition is granted the ultimate losers will not be GST or other US WEST competitors. Instead, the losers will be consumers of high capacity services (many of whom themselves are small businesses) who will face fewer choices and higher prices. The grant of this petition will not protect, in the long-run consumers, will not be in the public interest, and will not promote competition. Therefore, the statutory standards for forbearance have not been met and the FCC should deny the petition.

TABLE OF CONTENTS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Petition of US WEST Communications, Inc.	)	CC Docket No. 98-157
for Forbearance from Regulation as a	)	
Dominant Carrier in the Phoenix, Arizona	)	
MSA	)	
	)	

Comments of GST Telecom Inc.
in Opposition to the Petition for Forbearance

On August 24, 1998, US WEST Communications, Inc. ("US WEST") filed a petition for forbearance from regulation pursuant to § 10 of the Communications Act of 1934.[1] Specifically, the petition requests that the Federal Communications Commission ("FCC") determine that US WEST is a non-dominant carrier for high-capacity telecommunication services in the Phoenix, Arizona Metropolitan Statistical Area ("Phoenix MSA"). A grant of the petition would result in US WEST no longer being subject to price cap regulation, geographic rate averaging, mandatory tariff filings,[2] 15-day notification for tariff filings with cost support, and

[1] 47 U.S.C. § 160. Section 10 was added to the Communications Act by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

[2] US WEST would be a carrier providing, among other things, exchange access service to high-capacity customers. Providers of exchange access service, other than incumbent local exchange carriers ("ILECs") are not required to file tariffs. *Hyperion Telecommunications, Inc. Petition Requesting Forbearance; Time Warner Communications Petition for Forbearance; Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers*, CC Docket No. 97-146, 12 FCC Rcd 8596 (1997) ("Hyperion Order").

any other rule applicable to US WEST but not its competitors in the Phoenix MSA.[3] GST Telecom Inc. ("GST") will demonstrate that, despite protestations to the contrary, US WEST remains the dominant provider of high capacity services in the Phoenix MSA. This market dominance in Phoenix and other US WEST territories will enable it to cross-subsidize a predatory pricing scheme in the market for high capacity services in the Phoenix MSA. As a result of US WEST's market power and its ability to unfairly compete in the Phoenix MSA, GST asserts that US WEST ***has failed to establish all of the following***: 1) enforcement is not necessary to ensure that rates and practices are just, reasonable, and nondiscriminatory; 2) enforcement is not necessary to protect consumers; and 3) forbearance will be in the public interest. Absent a showing that all three conditions are met, the FCC must deny the petition.

I. GST's Interest in this Proceeding

GST, as a competitor of US WEST in the Phoenix MSA, certainly has a significant interest in the outcome of this proceeding. A FCC decision to forbear from regulation at this time could increase US WEST's already dominant competitive position with respect to GST.

Even more significant than the impact that the decision will have on GST, will be the adverse effect on competition. If US WEST is unshackled from regulation imposed on it as a dominant carrier, US WEST will be able to drive competitors, particularly smaller ones such as GST, from the market by pricing its services below cost and using its market dominance to subsidize the predatory pricing. The ultimate losers then will not be the competitors but the

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[3] Petition of US WEST Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA 35 (Filed Aug. 24, 1998) ("US WEST Petition").

consumers of high-capacity telecommunications transmission who will face fewer choices and higher prices. Clearly, Congress could not have intended such anticompetitive results when it authorized the FCC to forbear from regulation.

II. The Statutory Landscape of Forbearance

The story of § 10 began many years before the enactment of the Telecommunications Act. In 1982, the FCC issued a series of orders establishing a permissive detariffing policy for nondominant interexchange carriers.[4] Some 12 years later, the Supreme Court found that the FCC did not have the authority to establish permissive detariffing in contravention of a clear statutory directive mandating that tariffs be filed.[5]

In partial response to the Supreme Court's pronouncement, Congress added § 10 to the Communications Act. The FCC is required to forbear from applying any regulation or provision of the Communications Act to telecommunications carriers if certain conditions are met.[6] Specifically, the FCC must be satisfied that:

> (1) enforcement of such regulation or provision is not necessary to ensure that charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or

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[4] A complete history of that proceeding can be found in *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20,730 (1996) ("Interexchange Forbearance Order").

[5] *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 227-31 (1994).

[6] *Interexchange Forbearance Order*, 11 FCC Rcd at 20,734. Sections 251(c) and 271 are specifically excluded from the FCC's forbearance authority until it has determined that those sections have been fully implemented. 47 U.S.C. § 160(d); *Petition of US WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-26, FCC 98-188, Memorandum Opinion and Order, slip op. at ¶¶ 69-80 (Rel. Aug. 7, 1998).

> telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[7]

In addition to these factors, the FCC is required to consider whether forbearance will promote competitive market conditions, including the enhancement of competition among providers of telecommunication services.[8] Determinations to forbear are made on a case-by-case basis[9] and in this instance raise very novel questions of law and fact[10] concerning the determination that an

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7 *Id.* at § 160(a).

8 *Id.* at § 160(b); *accord Interexchange Forbearance Order*, 11 FCC Rcd at 20, 735.

9 *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services, Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, WT Docket No. 98-100; Memorandum Opinion and Order and Notice of Proposed Rulemaking, slip op. at ¶ 10 (Rel. July 2, 1998) ("PCS Forbearance Order").

10 US WEST's assertion that the petition "does not present any novel questions of law or fact which might prolong the Commission's analysis," *US WEST Petition* at 1-2, should be given little credence. No ILEC, much less a RBOC, has filed a forbearance petition seeking the type of total deregulation that US WEST seeks. *Compare Petition for Forbearance for 2% Mid-Size Local Exchange Companies* (Filed Feb. 17, 1998) (seeking forbearance from certain reporting and recordkeeping requirements but not seeking classification as nondominant carrier). Furthermore, a decision to forbear from regulation of certain services may prevent the state of Arizona from regulating the same services, 47 U.S.C. § 160(e) (prohibiting state from continuing to apply or enforce any provision of Communications Act that FCC has determined to forbear from applying). Thus, a decision to forbear raises the distinct possibility that US WEST's high capacity services will no longer be subject to any regulation. If this is not a novel issue, GST is at a loss to find an issue that will raise novel questions of law or fact.

ILEC, and an Regional Bell Operating Company[11] at that, should be considered nondominant in its service territory.

As GST will demonstrate, the FCC cannot grant US WEST's petition because none of the statutory conditions mandating forbearance have been met. Nor will the grant of the petition promote competitive conditions or enhance competition among providers. In fact, it is likely to have the exact opposite result. However, before addressing these factors, it is necessary for GST to dispel some misconceptions limned in the US WEST petition.

III. GST and US WEST -- A Comparison

US WEST attempts to paint a picture of itself as a besieged David assaulted from all sides by Goliaths. US WEST is so convinced of the bleakness of its competitive situation that it asserts at two different points in its petition that the five facilities-based carriers, including GST, have access to financial resources equal to or greater than US WEST's with which to fund expansion of their network.[12] A comparison of GST and US WEST demonstrates that US WEST has miscast the roles of David and Goliath.

GST has a certificate of public convenience and necessity to operate as a competitive local exchange carrier ("CLEC") in Arizona, nine other western states, and the

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[11] *SBC Communications, Inc. v. FCC,* No. 98-10140, slip op. at 4-5 (5th Cir. Sept. 23, 1998) (imposing special additional regulatory restrictions on Regional Bell Operating Companies).

[12] *US WEST Petition* at 5, 16.

Commonwealth of the Northern Marianas Islands. US WEST serves 14 midwestern and western states as the ILEC.[13]

As a facilities-based CLEC, GST operates state-of-the-art, digital telecommunications networks in Arizona that provide an alternative to the ILEC. GST offers a full line of integrated telecommunications products and services, including exchange service, exchange access service, interexchange service, special access services, and Internet and other data transmission services. As noted by US WEST, GST's network includes 300 route miles of fiber in Arizona[14] and 11 miles of fiber in downtown Phoenix.[15] By way of comparison, US WEST has 3,356 miles of fiber in Arizona or ten times the amount of GST's installed fiber.[16] In addition to the fiber, US WEST has 42,492 miles of copper wire.[17] Thus, US WEST's network in Arizona dwarfs and completely surrounds GST's.

Access line counts highlight this disparity in network size. GST has installed 72,000 access lines throughout its ten state region.[18] US WEST controls more than 16 million access lines. In Arizona alone, US WEST controls about 30 times the number of access lines

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[13] Federal Communications Commission, *Preliminary Statistics of Communications Common Carriers for 1997*, Table 2.1 (Rel. May 1998) ("SOCC").

[14] Much of that fiber is dedicated to GST long-haul transport operations -- not its exchange and exchange access service.

[15] *Id.* at 15.

[16] US WEST Armis Report 43-07, Table II (1997).

[17] *Id.*

[18] <http://www.gstcorp.com/press/gen108.html.>

(about 2.2 million) than GST has throughout its network.[19] If these statistics prove anything, it is that GST is the David besieged by one Goliath -- US WEST.

US WEST's financial and personnel resources also dwarf that of GST's. US WEST's total revenue was $15.235 billion which is approximately 150 times greater than GST's 1997 fiscal year revenue of $105 million.[20] US WEST's *net income* of $697 million exceeds GST's *gross annual revenue* by nearly 700 percent.[21] US WEST had shareholder equity of more than $11.324 billion and total assets of $39.47 billion whereas GST has assets of $1.2 billion.[22]

GST is a small, entrepreneurial telecommunications company with approximately 1,400 employees. Given the number of employees, the FCC has determined that GST is a small business when analyzing proposed regulations under the Regulatory Flexibility Act.[23] The Small Business Administration reached an identical conclusion for purposes of government procurement.[24] Therefore, GST is a small business.

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[19] *SOCC*, Table 2.3.

[20] *Compare SOCC*, Table 1.1 *with* 1997 GST Annual Report.

[21] *Id.*

[22] *Compare SOCC*, Table 1.1 *with* GST 10-Q for Quarter ending June 30, 1998 at 3.

[23] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, slip op. at ¶ 224 (Rel. Aug. 7, 1998) (defining small CLECs as those with less than 1,500 employees). The Regulatory Flexibility Act requires federal agencies, including the FCC, *see Value Vision Int'l v. FCC*, No. 98-1137, slip op.at 14-16 (D.C. Cir. July 24, 1998), to analyze the impact of their proposed rules on small businesses, and if those impacts are significant, examine alternatives which will mitigate those adverse effects.

[24] 13 C.F.R. § 121.201 (1998) (Small Business Administration regulation defining providers of Telephone Communication Services except Radiotelephone as small if business has

(continued...)

In contradistinction, US WEST is anything but a small business under the definitions utilized by the SBA and the FCC. US WEST has approximately 67,000 employees exceeding the SBA cutoff for small business in the wireline telecommunications sector by a factor of more than 40. The FCC also has determined that US WEST is a dominant local exchange carrier and not a small business for purposes of the Regulatory Flexibility Act.[25]

GST is a small business competitor of US WEST's. As demonstrated, GST certainly lacks the network, financial and personnel resources of US WEST. Thus, it is disingenuous, at best, for US WEST to claim that GST has "access to financial resources equal to or greater than US WEST's."

IV. US WEST has not Properly Defined its Market

GST concurs with US WEST in one respect -- the FCC's analysis of market power requires a determination of the relevant product markets.[26] Although US WEST accurately recites FCC precedent, it never does define the product market.

US WEST states: "[t]his report analyzes the state of competition in the market for high capacity telecommunication services (i.e., DS-1 and above) in the Phoenix, Arizona metropolitan area."[27] However, US WEST and its consultants never actually define the services

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[24](...continued)
fewer than 1,500 employees).

[25] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15,499, 16,145 (1996).

[26] *Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3285 (1995) ("AT&T Order").

[27] Quality Strategies, *US WEST High Capacity Market Study Phoenix Metropolitan*
(continued...)

that are being studied for determinations of market dominance. In fact, some of the data used by its consultants includes measurements of DS-0 circuits[28] which is a normal voice grade circuit and certainly cannot be considered a high capacity service. Furthermore, US WEST apparently does not distinguish between high capacity services sold for exchange service and those sold for exchange access service. US WEST's very non-specific approach dramatically differs from the FCC's analytical methods.

The FCC goes to great length to divide larger market segments into smaller submarkets for conducting its analysis. For example, the FCC, when it determined that AT&T was no longer a dominant interexchange carrier, analyzed the following submarkets of the interstate interexchange market: residential, business and 800, operator services and calling cards, analog private line and 800 directory assistance, reselling, and Alaska and Hawaii service.[29] Similarly, in its consideration to forbear from regulating Comsat, the FCC examined competition in the following submarkets of international satellite telephony service: switched voice, private line, full-time and occasional video, Intelsat earth station service, thin routes and occasional-use single carriers.[30]

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[27](...continued)
Statistical Area 3 (1998) ("Attachment A").

[28] *Id.* at 11, 18. A DS-0 is the worldwide standard for digitizing one voice conversation. H. Newton, *Newton's Telecom Dictionary* 231 (13th ed. 1998).

[29] *AT&T Order*, 11 FCC Rcd at 3309-44.

[30] *Cf. Comsat Corp. Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, File No. 60-SAT-ISP-97, Order and Notice of Proposed Rulemaking, slip op. at ¶¶ 25-49 (Rel. April 28, 1998) ("Comsat Order").

US WEST provides no similarly detailed description of the product market so it becomes impossible to examine the factual assertions concerning its dominance or lack thereof.[31] For this reason alone, the FCC should dismiss the petition for forbearance.

V. US WEST Remains the Dominant Carrier for High Capacity Services

US WEST asserts that the FCC uses "standard economic concepts in its assessment of a firm's market power."[32] GST agrees with US WEST's statement of the law. However, GST disagrees with US WEST about the conclusions that can be drawn from the application of those principles. Assuming solely for the purpose of these comments that US WEST's statements concerning its market share are accurate, any examination of US WEST's market share conclusively demonstrates that it still has substantial market power, even for its amorphous "high capacity" market.

A. US WEST Has Substantial Market Power

US WEST readily admits that it provides 77 percent of the total facilities (including both end-user sales and interexchange transport) in the Phoenix MSA for high capacity services.[33] Its end-user sale market share is 72 percent and its transport market share is 84 percent.[34] This market power is enhanced by US WEST's control over a bottleneck facility -- the local loop to which all of its competitors must interconnect.

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31 *Cf. United States v. Marine Bancorporation*, 418 U.S. 602, 618 (1974); *FTC v. Freeman Hosp.*, 69 F.3d 260, 267 (8th Cir. 1995) (courts will not enjoin a merger under Clayton Act absent identification of a credible relevant market).

32 *US WEST Petition*, Attachment C at 3.

33 *US WEST Petition* at 6.

34 *Id.*

The FCC, like the Department of Justice and the Federal Trade Commission, uses the Herfindahl Hirschman Index ("HHI") as the primary mechanism, but not the sole means, for assessing market power.[35] The HHI is calculated by summing the squares of the market share of all participants.[36] If the sum of the squares exceeds 1800, that is evidence of a highly concentrated market.[37] US WEST's market share results in an HHI of 5929 or substantially in excess of what the Department of Justice and the Federal Trade Commission consider being highly concentrated markets.[38] The Department of Justice, the Federal Trade Commission and the courts[39] then would consider US WEST to operate in a highly concentrated market enabling it to raise prices above competitive levels.[40]

B. US WEST's Fails to Adequately Rebut the Finding of Market Power

US WEST attempts to deflect this unassailable evidence of its market power by noting that competitors have networks offering easily substitutable products, that US WEST has

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35 *See AT&T Order*, 11 FCC Rcd at 3307.

36 United States Department of Justice and Federal Trade Comm'n, *Horizontal Merger Guidelines* § 1.5 (1992).

37 *Id.*; *accord FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1081-82 (D.D.C. 1997).

38 The determination that the high capacity market is extremely concentrated would not change if US WEST's share of the end-user market was examined. That share results in an HHI of 5184 still in excess of the 1800 HHI denoting a concentrated market.

39 *E.g., Id.*; *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1294 (W.D. Mich. 1996), *aff'd mem.*, 121 F.3d 708 (6th Cir. 1998).

40 *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963); *United States v. Baker Hughes*, 908 F.2d 981, 982-93 (D.C. Cir. 1990).

only a 30 percent share of some undefined retail market, and that the growth of competitors has been dramatic. All of these arguments are severely flawed.

1. US WEST still Controls the Key Bottleneck Facilities

US WEST contends that customers for high capacity services have numerous accessible alternatives, either immediately or in the near future with only "minor" investments by competitors.[41] US WEST goes on to assert that, under FCC precedent highly elastic supply and demand represent substantial evidence of a competitive market.[42] US WEST then argues that high demand and supply elasticities exist for high capacity services in the Phoenix MSA. GST does not dispute US WEST's interpretation of FCC precedent, only its application to the instant proceeding.

While US WEST has spent substantial sums of money attempting to demonstrate that customers have easy access to facilities-based carriers, US WEST has failed to address one salient fact. Its competitors, unless they are installing a private network and a private network only, must interconnect with US WEST's ubiquitous network. US WEST can inhibit the development of competition by, among other things, denying competitors access to physical collocation space, failing to provision interconnection trunks in a timely manner, improperly testing NXX loadings, and imposing last-minute delays in making cutovers to competitors. Any one of these problems may lead to a failure by GST to meet a commitment made to a potential customer. As a new participant in a market, GST's failure to meet these commitments with an explanation that it was not GST's fault will be of little salvation to the customer seeking

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41 *US WEST Petition* at 23-31.

42 *AT&T Order*, 11 FCC Rcd at 3307.

telecommunication services. The result will be the permanent loss of that customer. Given the need for interconnection, customers do not have access to a highly elastic, easily substitutable supply -- the US WEST network. US WEST's control over this bottleneck facility demonstrates beyond cavil that US WEST, as it was in 1994, remains the dominant carrier for high capacity services in the Phoenix MSA.[43]

2. The 30 Percent Retail Market Share is Irrelevant in Assessing US WEST's Market Dominance

US WEST seems to believe that its 30 percent share of the retail market for high capacity services evidences an absence of market dominance. US WEST contends that this is the most important statistic because "it identifies the carrier that has a direct account relationship with the customer. In fact, the customer may not even be aware of the identity of the carrier actually provisioning the underlying high capacity facilities."[44] According to US WEST, this gives a significant marketing advantage to US WEST's competitors in order to offer a "full service package which includes interLATA voice and data services."[45] Left unstated by US WEST is the conclusion that a competitive market exists due to the low market share and

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43 Had a competitive market existed in the Phoenix MSA in which US WEST had opened its network to competitors, it would be logical to assume that US WEST would have filed an application for in-region InterLATA service pursuant to § 271 of the Telecommunications Act. However, no such application exists. This petition simply seems to be another subterfuge around the requirements of § 271. And the FCC has stated that it has no authority to forbear from applying § 271 until it has been fully implemented. *Petition of US WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-26, FCC 98-188, Memorandum Opinion and Order, slip op. at ¶¶ 69-80 (Rel. Aug. 7, 1998).

44 *US WEST Petition* at 19.

45 *Id.* at 20.

comparative marketing advantages. The argument is so riddled with holes that GST almost does not know where to start; but like the little Dutch boy trying to stem the leaks in the dike, GST will give it its best effort.

First, even if US WEST was declared nondominant for high capacity services, it would be unable to provide in-region interLATA voice and data services until it files an application pursuant to § 271, that application is reviewed by the Department of Justice, the FCC consults with the Department and state regulators, and then approves US WEST's entry. None of that has happened in this or any other proceeding. Therefore, even if declared nondominant, US WEST still will be at a "marketing disadvantage."

Second, US WEST, as it has done with the rest of the high capacity market, does not define this so-called retail market. If the retail market is businesses that use high-capacity services, such as ISPs, banks, or government agencies, this petition will not eliminate the "marketing disadvantage" US WEST. If the retail market consists of other carriers, then US WEST is still selling its service, simply not to a specific end-user. US WEST certainly could use some of the $172.8 million[46] spent on advertising its regulated telephone service and direct it at high capacity end users in an effort to win back their business.

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[46] *SOCC*, Table 2.9, at 78. Note that the amount of money that US WEST spent on advertising in 1997 exceeds GST's 1997 gross annual revenue by 65%. In addition to the monies specifically accounted to advertising, US WEST also spent $283.7 million on sales, *id.*, which includes "the determination of individual customer needs [and] development and presentation of customer proposals." 47 C.F.R. § 32.6612. US WEST also could dip into the nearly $150 million account for product management, *SOCC*, Table 2.9, at 78, which includes funds for competitive analysis, product and service identification, and identification and establishment of distribution channels. 47 C.F.R.§ 32.6611.

Third, US WEST includes DS-0 circuits[47] in its statistics for the retail market. As GST has already noted, DS-0 circuits are standard voice grade channels, not high capacity circuits. Thus, losses in the voice grade market should have no bearing on the assessment of US WEST's market dominance for high capacity services -- unless, of course, US WEST really is asking the FCC to declare it nondominant for plain old telephone service, a proposition so absurd that it needs no response.

Fourth, US WEST seeks forbearance from FCC regulation of its access services (US WEST does not file a federal tariff for exchange service). Access services, while available to any customer meeting the conditions of its tariff, are generally purchased by other carriers, generally interexchange carriers. GST does not know what "retail" market exists for these access services. To the extent that US WEST is complaining that it cannot provide in-region interLATA services along with the provisioning of this access service, the remedy is not forbearance but application to the FCC pursuant to § 271.

Finally, US WEST does not provide any data on the comparative importance of the retail end-user market to the wholesale market. US WEST asserts that its share of the high capacity market in the Phoenix MSA is $50 million and the total market for high capacity services is $65 million.[48] Without knowing what portion of the $65 million constitutes retail sales, neither GST nor the FCC can determine the relative significance or insignificance of a 30 percent share of the retail market.

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[47] *Attachment A* at 17.

[48] This is based on US WEST's assertion that it controls 77 percent of the high capacity market in the Phoenix MSA. *US WEST Petition* at 6, 22.

In summary, US WEST's concern about its 30 percent retail share has no bearing on this forbearance petition. No amount of economic legerdemain detracts from the primary conclusion -- US WEST is the dominant participant in the market for high capacity services in the Phoenix MSA.

3. Impressive Competitor Growth has no Relation to US WEST's Market Dominance

Finally, US WEST notes that its competitors have registered an impressive 13 percent growth in high capacity services. US WEST also cites equally impressive growth statistics in market share for services purchased by end-users (6 percent to 28 percent) in just two quarters of 1997 and an increase of 11 percent over the same time period for growth in competitor sales of transport services.

To be sure, these statistics are impressive. However, GST believes that US WEST dramatically understates the growth of the competitive market for high capacity services. If one examines the market for high capacity services in 1994, US WEST had the market all to itself.[49] Any competitor that succeeded in taking away a single customer would have experienced, on a purely mathematical level, infinite growth. Even if GST accepts as accurate US WEST's measure of competitor growth rates (and GST does not), such spectacular growth rates do not necessarily translate to an erosion of US WEST's market dominance.

A similar contention to that raised by US WEST was proffered by SBC in its efforts to obtain in-region InterLATA service authorization in Oklahoma pursuant to § 271. The basic premise of § 271 is that once sufficient competition exists, the RBOCs will not be able to

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49 *Attachment* A at 3.

exploit their control over the local telephone network to inhibit competition in the in-region interLATA market.[50] In this regard, the § 271 decision calculus does not differ significantly from the analysis conducted to determine whether forbearance is appropriate. SBC's application for in-region interLATA service cited statistics that one carrier began offering service to a small number of customers, i.e., experienced infinite growth. The FCC patently rejected that argument[51] as did the D.C. Circuit.[52] The FCC concluded that competitors experiencing mathematically significant growth but still with only very small market shares was insufficient to diminish the potential adverse competitive consequences of SBC's dominance in the local exchange market.[53] The FCC should apply the same rationale to US WEST's request for regulatory forbearance.

Finally, there are explanations for the growth that do not relate to US WEST's diminution of market power. The most logical explanations are that US WEST has been either unwilling or unable to provide service in certain markets. For example, in 1994 Internet usage in this country was fairly minimal. Explosive growth of the Internet also resulted in the concomitant development of an Internet services provider ("ISP") industry which primarily consists of small businesses. These retail ISPs need high capacity services to provide efficient

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50 *SBC Communications, Inc. v. FCC,* No. 98-10140, slip op. at 4-5 (5th Cir. Sept. 23, 1998).

51 *Application by SBC Communications Inc. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order, 12 FCC Rcd 8685, 8699 (1997) ("Oklahoma Order").

52 *SBC Communications, Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998).

53 *Oklahoma Order*, 12 FCC Rcd at 8699-700.

connection for their customers to gain access to the Internet. For whatever reason, US WEST has been unable to meet the business and telecommunications requirements of these ISPs. Thus, it is not surprising that ISPs sought service from carriers other than US WEST.[54] ISPs and other heavy users of telecommunication services, such as interexchange carriers, school districts, and the federal government, would have had a substantial wait for the provisioning of high capacity trunks. Obviously, users with immediate needs for high capacity services could not wait until US WEST was able to install the appropriate trunks. These users certainly would seek alternatives to US WEST. Thus, the most logical reason for the growth of competitors has been due to decisions of US WEST concerning their own internal operations and failure to invest in their network. Given this situation, it would be logical to assume that competitors might eat into US WEST's pre-1994 100% market share without diminishing US WEST's overall market dominance for high capacity services or its ability to translate its control over the local network into significant competitive advantages in an unregulated environment.

VI. US WEST can Cross-Subsidize Competitive Services with Revenue from Non-Competitive Services or Markets

US WEST, not surprisingly, fails to address the greatest flaw in its argument for forbearance -- its ability to cross-subsidize its high capacity service in the Phoenix MSA with revenue obtained from areas in which it remains the dominant market provider of high capacity services such as Seattle, Portland, Denver, and Minneapolis. US WEST, as the dominant

[54] And to the extent that this constitutes retail high capacity sales, they are sales of exchange service which is local in nature. *See Pacific Bell Telephone Company, Pacific Bell Tariff FCC No. 128, Pacific Bell Tariff Transmittal No. 1986*, CC Docket No. 98-103, Comments of GST Telecom Inc. in Opposition to the Direct Case 1-8 (Filed Sept. 18, 1998). GST incorporates by reference those comments in this proceeding.

provider, will lower prices to predatory levels for high capacity services in the Phoenix MSA and subsidize that predation by raising prices in all other markets. None of the facilities-based competitors, and certainly GST, do not have the ability to cross-subsidize competition with revenue obtained from captive customers. If successful, a predation strategy will result in the long-run elimination of competitors enabling US WEST to be the single provider in the Phoenix MSA with adverse consequences to customers that need no further expatiation.

To understand how the potential cross-subsidization would work, it is necessary to briefly review the FCC's price cap regulatory regime. The price cap plan establishes a price cap index for each of several different baskets of related ILEC access services. Each basket has a separately calculated index that establishes the maximum level that ILECs may charge for all the services within that basket. Within those price cap baskets are service band limits further restricting price movement. Most significantly, price changes that fall within the price cap index and service band limits are presumed lawful, i.e., just, reasonable and nondiscriminatory.[55]

US WEST operates as one entity throughout its entire service territory and files one federal access tariff.[56] If US WEST was absolved from compliance with the price cap regime

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55 *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, FCC95-393, Further Notice of Proposed Rulemaking, slip op. at ¶ 11 (Rel. Sept. 20, 1995) ("Price Cap Performance FNPRM").

56 Since US WEST files one federal access tariff for its entire region, any regulatory costs are spread across all 16 million access lines and 14 states in which it operates. US WEST still will have to absorb the cost of tariff filing and cost support for its federal tariff even if forbearance applies in the Phoenix MSA. Thus, US WEST would see at best, an insignificant reduction of the $72 million that it spent for external relations, *SOCC*, Table 2.9, at 78, an account which includes presentation of material to regulators and the filing of tariffs. 47 C.F.R. § 32.6722. GST suspects that US WEST's interest in obtaining forbearance has far more to do with its ability to cross-subsidize competition in the Phoenix MSA and far less to do with (continued...)